STATE OF MICHIGAN
IN THE SUPREME COURT

CALEB GRIFFIN,

Plaintiff-Appellant,

v

SWARTZ AMBULANCE SERVICE,

Defendant-Appellee,

and

SARAH ELIZABETH AURAND

Defendant.
_____/

Supreme Court Case No. 159205

Court of Appeals
Case No. 340480

Genesee County Circuit Court
Case No. 14-103977-NI
Hon. Joseph J. Farah

PLAINTIFF-APPELLANT'S REPLY TO APPLICATION FOR LEAVE TO APPEAL

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I. INTRODUCTION

Defendant-Appellee's Response [sic, Answer] to Plaintiff-Appellant's Application for Leave to Appeal (hereinafter, "Answer") is an exercise in misrepresentation and distraction. Defendant utterly fails to properly view and present the direct and circumstantial evidence in the light most favorable to the non-movant and to make all reasonable inferences from such evidence (viewed in such manner) in the non-movant's favor. Plaintiff's Application anticipated and preemptively addressed virtually all of the arguments made in Defendant's Answer, yet Defendant's Answer bizarrely fails to respond to those arguments. Instead, the Answer makes the arguments that Plaintiff's Application anticipated and already preemptively addressed, leaving Plaintiff with little to put forward in his Reply other than reiteration of his initial Application.

Defendant's Answer bizarrely, repeatedly argues that the accident between its ambulance and Sarah Aurand's vehicle was minor, that Mary Shifter's negligent driving does not amount to gross negligence, that the initial rollover accident could somehow have caused the injury to Plaintiff's popliteal artery, and that this is the third lawsuit brought by Plaintiff arising from the October 7, 2012 car accident and subsequent events. This is all meaningless distraction. Plaintiff has *never* contended he could establish gross negligence. Instead, Plaintiff has *always* contended that the Emergency Medical Services Act ("EMSA"), MCL 333.20901 et seq., is inapplicable, i.e., that Mary Shifter's mere negligent driving does not amount to "treatment of a patient," such that Plaintiff's ordinary negligence claim can proceed. Further, Defendant filed a motion for summary disposition based upon there purportedly being no question of material fact as to causation, the trial court denied that motion, and Defendant never appealed that ruling. Accordingly, any discussion of causation is totally irrelevant to this appeal. Finally, Defendant's repeated, unsupported representations regarding two prior related actions and the purported allegations of

their complaints should be disregarded and stricken. Defendant cites nothing in the lower court record to support such assertions,[1] and the fact that Plaintiff Caleb Griffin has made only a paltry recovery in other actions asserting liability arising from his leg being amputated above his knee is irrelevant to the issue on appeal and a transparent attempt by Defendant to bias this Court and "muddy the waters."

II. REBUTTAL OF DEFENDANT-APPELLEE'S COUNTER-STATEMENT OF ORDER APPEALED

Failing to view the evidence in the light most favorable to non-movant, and failing to acknowledge or address the fact that Plaintiff's Application anticipated and already thoroughly exposed the falsity of such argument, Defendant-Appellee's Counter-Statement of Order Appealed asserts that Mary Shifter "treated Plaintiff at the scene of the accident and prepared him for transport to the emergency room." (Answer, p vii). Section III.E.1 of Plaintiff's Application articulates how, properly viewing the evidence in the light most favorable to plaintiff and making all reasonable inferences in his favor, there is no record evidence that (or at the very least a question of material fact whether) Ms. Shifter provided any "treatment" to Caleb Griffin, and, in any event, this is a red herring because liability is only sought based upon Mary Shifter's negligence in driving the ambulance, not for any other actions she may have taken. (Application, pp 25-27).

The Counter-Statement of Order Appealed claims Plaintiff has "urged the lower courts to adopt overly narrow definitions that would render the EMSA nugatory—precluding application to every act that could be engaged in by an EMT and nearly every act that a paramedic might

[1] Defendant's assertion that "Plaintiff is judicially estopped from pleading allegations contrary to those ple[]d in the matter of *Caleb Griffin v Swartz Ambulance Service & Jamey Griffin*, Case No. 12-99294-NI, filed in the Genesee County Circuit Court, Civil Division, the Hon. Joseph J. Farah presiding," obviously does not suffice. (Answer, p 2 (quoting Def's COA Brief, Appendix A, Second Amended List of Affirmative Defenses, ¶ 9)).

conceivably engage in." (Answer, p viii). This is falsehood and deception. Multiple panels of the Court of Appeals have *already* adopted and applied the *Random House Webster's College Dictionary* (1997) definition of "treatment" and it should likewise have been employed in this case. *Doe v Doe*, unpublished opinion per curiam of the Court of Appeals, issued Sept 17, 2009 (Docket No. 285655) (Exh 16), at *11;[2] *Lee v Dowagiac Volunteer Fire Dep't Ambulance Serv*, unpublished opinion per curiam of the Court of Appeals, issued June 10, 2010 (Docket No. 289605) (Exh 19), at *2-*4. Defendant's "sky is falling" claim is hysterical and unsubstantiated. The *Doe* decision and its use of the *Random House Webster's College Dictionary* (1997) to define the term "treatment" as employed in EMSA, issued more than ten years ago and has not "swallowed" EMSA immunity in that interim period.

Defendant misstates and misrepresents the definition of "treatment" employed in *Doe* (Exh 16) and *Lee* (Exh 19) in an effort to mislead this Court. That definition is appropriate for its purpose of defining that term as it is used within the Emergency *Medical Services* Act. *Random House Webster's College Dictionary* (1997), in pertinent part, provides the following definition of "treatment": "[T]he application of medicines, surgery, therapy, ***etc.***, in treating a disease or ***disorder***." (Emphasis added). Such "treatment" involves application of a service, touching or actual manipulation of a patient and not something as indirect as driving a motor vehicle.

In arguing the definition is too restrictive, Defendant repeatedly, deceptively fails to consider its use of the term "etc."[3] *Random House Unabridged Dictionary* (2019) defines "etc."

[2] Rev'd in part on other grds 486 Mich 851 (2010). Numeric exhibits references are to the exhibits to Plaintiff's Application.

[3] Later in its Answer, Defendant hypocritically argues the *Random House Webster's College Dictionary* (1997)'s definition of "treatment" is too broad! (Answer, p 30). "The 'etc. in the middle of the definition merely adds to the vagueness of same. In theory, the 'etc.' could include anything and everything." *Id.* This self-contradicting argument is in ignorance of the definition of "et cetera."

or "et cetera" to mean: "[A]nd others; and so forth; and so on (used to indicate that more of the same sort or class might have been mentioned, but for brevity have been omitted): *He had dogs, cats, guinea pigs, frogs, et cetera, as pets*." *Webster's New World College Dictionary* (5th ed., 2014) defines the term to mean: "1. and others; and the like; and the rest; and so forth. 2. or the like; or others of the same kind; or something similar." The *American Heritage Dictionary of the English Language* (5th ed., 2016) similarly defines "et cetera" to mean: "And other unspecified things of the same class; and so forth." There is nothing similar between driving or operating a motor vehicle and applying medicines, conducting surgery or providing therapy such that it does not constitute "treatment" and come within the immunity provided by MCL 333.20965(1). EMSA is obviously intended to provide protection for EMTs providing direct medical services, not for something so far removed as the manner in which they drive an ambulance as an ordinary motor vehicle without its lights and sirens activated.

Defendant offers to no evidence to support its argument that first responders are forced to compete for "who is forced to drive (without immunity)" by *Random House Webster's College Dictionary* (1997)'s definition of "treatment" employed in *Doe* ten years ago. (Answer, p viii). In any event, driving an ambulance in Priority 2 status, i.e., as an ordinary motor vehicle without its lights and sirens activated (like any pizza delivery person, Uber driver or other motorist) merits no immunity, nor is such immunity provided by EMSA.

III. REBUTTAL OF DEFENDANT-APPELLEE'S COUNTER-STATEMENT OF FACTS

Defendant asserts, "[a]s it relates to Swartz [Ambulance Service], its team was obviously providing medical treatment at all pertinent times." (Answer, p 5). On the contrary, medical first responder and EMT *Mary Shifter's negligent driving is* ***the sole basis*** *for Defendant's vicarious liability*, and she never provided ***any*** "treatment" to Caleb Griffin. (Application, pp 4-5, 25-27).

Further, EMSA immunity is not afforded to a "team" or group of people but rather to "***a*** medical first responder, emergency medical technician," etc. (i.e., individual persons evaluated individually). MCL 333.20965(1) (emphasis added); (Application, pp 18, 20-21).

Defendant repeatedly, falsely claims Plaintiff's Court of Appeals Brief relied upon a definition of "treatment" from *Webster's New World College Dictionary* (2010). (Answer, pp 7-8, 10 (citing Plf's COA Brief, pp 13-14)). On the contrary, Plaintiff's Brief only cited that dictionary's definition of "et cetera." Plaintiff has at all times consistently argued *Random House Webster's College Dictionary* (1997)'s definition of "treatment"—which was consistently employed in *Doe* (Exh 16) and *Lee* (Exh 19) to interpret EMSA—is the definition that should be followed. Defendant falsely argues "Plaintiff specifically argued that, although the EMSA confers immunity for 'treatment,' the 'treatment' would only apply 'to applying medicines, conducting surgery or providing therapy.'" (Answer, p 8 (quoting Plf's COA Brief, p 14)). Plaintiff argued nothing of the kind and has consistently noted that the use of "etc." in *Random House Webster's College Dictionary* (1997)'s definition of "treatment," ("the application of medicines, surgery, therapy, etc.") means that treatment ***is not*** strictly limited to applying medicines, conducting surgery or providing therapy, but rather, includes other things of similar class and kind. (Plf's COA Brief, pp 13-14; Application, pp 17-18). Plaintiff has consistently contended that there is nothing similar between merely driving or operating a motor vehicle and applying medicines, conducting surgery or providing therapy such that it does not constitute "treatment." *Id.* at 14.

IV. REBUTTAL OF DEFENDANT-APPELLEE'S ARGUMENT

With regard to statutory construction, Defendant's Answer notes in its Standard of Review that: "The words are to be applied to the subject matter and to the general scope of the provision, and they are to be considered in light of the general purpose sought to be accomplished or the evil

sought to be remedied by the constitution or statute." (Answer, pp 12-13 (quoting *Altman v Meridian*, 439 Mich 623, 636; 487 NW2d 155 (1992)). Defendant's quotation demonstrates why the Court of Appeals plainly erred in seeking out and employing a lay dictionary definition of "treatment" that was: (1) especially general and unrelated to the provision of medical services, even though it was employed in the context of interpreting the Emergency *Medical Services* Act; and (2) materially different from the lay dictionary definition employed by prior panels of the Court of Appeals (and the substantially similar definition employed by Judge Kelly). (Application, Section III.B., pp 13-20).

Defendant argues that because the EMSA's definition of "medical first responder" can include "a driver of an ambulance that provides basic life support services," Mary Shifter's negligent driving of the ambulance necessarily constitutes "the treatment of a patient." (Answer, pp 17-18 (quoting MCL 333.20906)). As already noted in Plaintiff's Application, this feeble argument ignores the plain language of the EMSA statute, MCL 333.20965(1), defining the conduct immunized from liability. (Application, pp 27-29).

Defendant argues *Random House Webster's College Dictionary* (1997)'s definition of "treatment," "is facially inappropriate to emergency first responders because they are rarely summoned for patients that have 'a disease or disorder'" and "medical first responders are most often called to respond to injuries, accidents, and calamities, and for medical conditions that require stabilization and transfer to [the] emergency room." (Answer, p 20). Defendant provides no evidence to demonstrate the matters "medical first responders are most often called to respond to," and its claim that the definition employed by the *Doe* (Exh 16) and *Lee* (Exh 19) Courts would fail to cover such matters is in ignorance of the definition of "disorder." In pertinent part, the *Random House Unabridged Dictionary* (2019) defines the term "disorder" to mean: "[A]

disturbance in physical or mental health or functions; malady or dysfunction: *a mild stomach disorder*." *Webster's New World College Dictionary* (5th ed., 2014) defined "disorder" as "an upset of normal function; ailment." The *American Heritage Dictionary of the English Language* (5th ed., 2016) defines "disorder" to mean: "A condition characterized by lack of normal functioning of physical or mental processes: *kidney disorders; a psychiatric disorder.*" The definition of "disorder," accordingly would include conditions arising from "injuries, accidents, and calamities, and . . . medical conditions that require stabilization and transfer to [the] emergency room." *Id.*

As already noted *supra*, in arguing that *Random House Webster's College Dictionary* (1997)'s definition of "treatment" is too restrictive, Defendant omits to consider that definition's use of the term "etc." Accordingly, "treatment" under this definition *is not* "limited to just providing medicine, surgery, and therapy," and includes other medical services of similar class and kind. However, there is nothing similar between driving or operating a motor vehicle and applying medicines, conducting surgery or providing therapy such that it does not constitute "treatment" under MCL 333.20965(1) and come within EMSA's immunity. EMSA is obviously intended to provide protection for EMTs providing direct medical services, not for something so far removed as the manner in which they drive an ambulance as an ordinary motor vehicle without its lights and sirens activated.

Defendant argues this Court should ignore its jurisprudence with regard to statutory interpretation and construction and instead, pursuant to Texas case law, look to a medical dictionary to define "treatment" as used in MCL 333.20965(1). (Answer, pp 21-22). This argument is self-contradicting and desperate. As already noted at pages 14-15 and 33 of Plaintiff's Application, under long established Michigan jurisprudence, "[u]nless defined in the statute, every

word or phrase should be accorded its plain and ordinary meaning, taking into account the context in which the words are used." *Tuggle v Dep't of State Police*, 269 Mich App 657, 663; 712 NW2d 750 (2005).

> Pursuant to MCL 8.3a, undefined statutory terms are to be given their plain and ordinary meaning, unless the undefined word or phrase is a term of art. We consult a lay dictionary when defining common words or phrases that lack a unique legal meaning. This is because the common and approved usage of a nonlegal term is most likely to be found in a standard dictionary, not in a legal dictionary. [*People v Thompson*, 477 Mich 146, 151-152; 730 NW2d 708 (2007) (internal citations omitted).]

"Courts may not speculate regarding legislative intent beyond the words expressed in a statute." *Mich Ed Ass'n v Secretary of State*, 489 Mich 194, 217; 801 NW2d 35 (2011).

Defendant's Answer utterly ignores the Application's argument that the Court of Appeals majority clearly erred in finding EMSA was applicable because "the evidence showed that . . . defendant [Swartz Ambulance Service] was providing emergency services to plaintiff when the collision occurred." *Griffin v Swartz Ambulance Service*, unpublished opinion per curiam of the Court of Appeals, issued Nov 29, 2018 (Docket No. 340480) (Exh 1), at *8-*9; (Answer, pp 22-23; Application, Section III.C., pp 20-23).

> Under EMSA, and, particularly, the language of MCL 333.20965(1), whether Mary Shifter was a member of Defendant's purported "ambulance staff" and whether another Swartz employee may have been providing emergency services to Plaintiff in the back of the ambulance at the time of the collision has absolutely no bearing on whether Swartz is vicariously liable under Michigan's Owner's Liability statute for Shifter's negligent driving. Under MCL 333.20965(1), one looks to the conduct of "***a***" medical first responder, emergency medical technician or paramedic, i.e, an individual and not the conduct of an ambulance staff. Further, Plaintiff's claim against Defendant Swartz Ambulance Service under Michigan's Owner's Liability statute based on Mary Shifter's negligent driving has nothing to do with the conduct of paramedic Greg LaPointe in the back of the ambulance. Rather, it is expressly limited to whether Mary Shifter's conduct in merely driving the ambulance at a motor vehicle without its lights and siren activated was negligent, and only whether this conduct constitutes "treatment of a patient" is properly considered for purposes of determining whether EMSA immunity is applicable. [(Application, pp 20-21).]

Anticipating Defendant's arguments based thereon, Plaintiff's Application pre-emptively addressed the very same unpublished Court of Appeals decisions that Defendant's Answer discusses. (Answer, pp 23-33; Application, Sections III.B. and III.E.2, pp 13-20, 27-30). Yet, Defendant's Answer astoundingly fails to respond to, note or address the Application's extensive discussion of this authority, none of which supports the *Griffin* majority's ruling that EMSA provides immunity to a medical first responder or EMT that is merely driving an ambulance (without lights and siren activated), as such conduct does not amount to "treatment of a patient."

As it did in its Brief on Appeal to the Court of Appeals, Defendant claims without further explanation that *Frost v United Ambulance Service*, unpublished opinion per curiam of the Court of Appeals, issued July 29, 1977 (Docket No. 194723) (Exh 20), "appears to construe a prior iteration of the EMSA immunity statute and may be disregarded." (Answer, p 31; Def's COA Brief, p 24). *Frost* construes identical language from MCL 333.20965(1) and there is no indication that the EMSA statute at the time of the *Frost* decision differed in any manner material to the present analysis. Rather than focusing on whether such actions came within the definition of "treatment," the *Frost* Court concluded EMSA immunity was inapplicable to "the straightforward task of maneuvering a person in a wheelchair," because it has nothing to do with "providing services to a patient outside a hospital . . . that are consistent with the individual's licensure or additional training required by the local medical authority" as stated in MCL 333.20965(1). *Frost* (Exh 20), at *1-*2. Likewise, the straightforward task of merely driving a motor vehicle in a "priority 2" run status, ***"nice and easy to the hospital"*** where "you're not running with the lights or sirens but you're also getting there as quickly as possible,"[4] in addition to not being "treatment of a patient," "neither require[s] licensure or additional training nor call[s] upon such specialized

[4] (Exh 4, Shifter Dep, pp 44, 46-47).

knowledge, such [that such] activities do not fall within the ambit of the immunity provided by the statute." *Frost* (Exh 20), at *2-*3. Without lights and sirens activated, Ms. Shifter, in driving the ambulance, was obliged to follow the constraints of the Motor Vehicle Code, including traffic lights and speed limits, *like any other motorist*.[5] See, e.g., MCL 257.603; MCL 257.632.

Defendant cites to an Attorney General Opinion addressing an ambulance transporting a person from one health facility to another and Genesee County Local Medical Control Authority regulations that do not address the conduct at issue here—negligent driving of an ambulance as a motor vehicle (without lights or sirens activated). This is not binding or relevant authority. (Answer, pp 32-34).

The Michigan legislature could have made the mere driving of an ambulance subject to EMSA immunity (and thereby, as the *Griffin* majority has done, bizarrely afforded more immunity to private ambulance company than a governmental entity pursuant to MCL 691.1405) but it did not. Merely driving a vehicle is not "treatment of a patient." The *Griffin* majority's departure from prior unpublished decisions of this Court defining "treatment" and applying EMSA without providing any discussion or reason therefore to reach its counterintuitive result creates inconsistency and uncertainty in the law and suggests improper legislation from the bench.

V. CONCLUSION AND RELIEF REQUESTED

WHEREFORE, the Court of Appeals' November 29, 2018 majority opinion should be peremptorily reversed for the reasons stated in Judge Kelly's dissent and herein and this matter remanded for further proceedings. Alternatively, the present Application should be granted.

[5] (Although, in light of the Court of Appeals majority opinion finding mere driving of an ambulance to be "treatment of a patient," apparently EMSA would allow an ambulance driver to drive the ambulance without regard to the Motor Vehicle Code without lights and sirens activated so long as such violations do not constitute gross negligence or willful misconduct).

Respectfully submitted,

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